IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 525 of 1990

Shri Babasaheb Krishna Kanade ..Appellant

V/s

1. Anant Ramchandra Kulkarni
2. Ramchandra Abaji Gurav ..Respondents

Shri P.D.Dalvi for Appellant

Shri R.S.Apte for Respondent nos.1 and 2

CORAM:S.R.SATHE,J.

DATED:5th August 2004

ORAL JUDGMETN :-

1. Being aggrieved by the judgment and order passed by the Court of 6th Additional District Judge, Kolhapur in Regular Civil Appeal No.60 of 1986 whereby a decree for specific performance passed by the Court of Joint Civil Judge, J.D., Kolhapur in Regular Civil Suit No.557 of 1980 was confirmed and the appeal was dismissed, the defendant has preferred this second appeal. For sake of convenience hereinafter the parties

shall be referred to as plaintiffs and defendant.

2. Brief facts giving rise to this appeal are as under :

. The suit property described in detail in para 1 of the plaint was owned by defendant. He agreed to sell the said property to the plaintiff for Rs.3500/- and accordingly executed an agreement to sell on 23-5-1977. By virtue of the said agreement it was decided to execute the sale deed within one month. Amount of Rs.1000/- was paid by way of earnest money and balance was to be paid at the time of sale deed. It was made clear in the said agreement to sell that in case the defendant fails to execute the sale deed then the plaintiff can get the same executed through Court. After the execution of agreement to sell the defendant was in need of money and as such plaintiff paid certain amount to him from time to time and obtained necessary receipt. However, for last payment of Rs 800/- no receipt was executed by the defendant. Then plaintiff called upon the defendant to execute the sale deed but he did not execute the same. On the contrary on 22-1-1978 the defendant published one notice in daily Satyawadi and informed the plaintiff that he should get the

sale deed executed within 8 days. Plaintiff gave reply to the said notice and again called upon the defendant to execute the sale deed. However, the the defendant did not execute the same, hence the plaintiff filed Regular Civil Suit No.557 of 1980 for specific performance of the agreement to sell.

3. The defendant filed his written statement and contended that he did not receive the amount as alleged by the plaintiff. He also contended that plaintiff was in fact not ready and willing to perform his part of the contract. He further contended that time was the essence of the contract and within that period the plaintiff was not ready to execute sale deed. Hence on these points the defendant prayed for dismissal of the suit.

4. On these pleadings the learned trial Court framed issues at Exh.16. After considering the evidence adduced by both the parties, the learned trial Court came to the conclusion that plaintiff has proved that he has paid Rs.2600/- towards the purchase price and had also shown his readiness and willingness to perform his part of contrary. The lower Court also observed that time was not essence of the contract particularly finding that it was necessary to

obtain the permission from the competent authority under the Urban Land Ceiling Act. Considering all this the trial Court passed a decree for specific performance of the agreement.

5. Being aggrieved, the defendant filed Civil Appeal No.10 of 1986 in the District Court, Kolhapur.After hearing the arguments of both the learned Advocates, the first appellate Court also came to the conclusion that plaintiff was all along ready and willing to perform his part of the contract but defendant has failed to execute the same. He, therefore, confirmed the finding recorded by the learned trial Court and dismissed the appeal.

6. Defendant has challenged the first appellate court’s order in this second appeal.

7. Substantial question of law formulated at the time of admission of this appeal is whether the plaintiff was ready and willing to perform his part of the contract as contemplated under Section 16(c) of the Specific Relief Act, 1963.

8. Shri Dalvi, learned Advocate for the defendant has urged only two points. Firstly, he submitted that the learned trial Court has

not taken into consideration the fact that there is no specific averment regarding readiness and willingness in the plaint and as such the learned trial Judge ought to have held that the plaintiff was not ready and willing to perform his part of the contract. Secondly, he also canvassed before me that as in the agreement to sell there was in fact no specific stipulation regarding obtaining permission from the competent authority, there was no need to consider the said aspect. He therefore submitted that finding recorded by both the courts below is set aside and plaintiff's suit be dismissed. As against this, the learned Advocate for the plaintiff supported the judgment ad order passed by the first appellate court.

9. It is an admitted fact that agreement to sell of the suit land was executed by the defendant in favour of the plaintiff on 23-5-1977 and at that time he received amount of Rs.1000/- by way of earnest money. It is also not in dispute that there was stipulation in the agreement whereby the sale deed was to be executed within one month. However at the same time there was specific recital in the agreement thereby indicating that time was not essence of the contract. The learned trial Court after

considering this issue in detail came to the conclusion that so far as the suit transaction is concerned time was not essence of the contract. There is no reason to interfere with the said finding.

10. It is true that as per provisions of Section 16(c) of the Specific Relief Act it is necessary for the plaintiff to aver and prove that plaintiff was ready and willing to perform his part of the contract. The question arises whether it is absolutely essential for the plaintiff to say in specific words that he was and is ready and willing to perform his part of the contract from the date of execution of the agreement to sell till filing of the plaint.It is needless to say that Court has to take into consideration all averments in the plaint and then find out whether the plaint discloses that plaintiff was ready and willing to perform his part of the contract and whether he had indicated so by some averments in the plaint. It may be a case where the plaintiff may point out various instances or the actions taken by him from time to time which in fact clearly indicate that such actions were taken in pursuance of the agreement executed between the plaintiff and defendant. If there are such recitals in the plaint then certainly one can

safely infer that plaintiff has averred and proved his readiness and willingness to perform his part of the contract. In the instant case if we peruse plaint, we find that he has specifically averred that for want of necessary permission from the competent authority transaction could not be completed within a period of one month. He also averred that defendant was in need of money and as such towards the sale transaction, he paid Rs.500/-, Rs.150/- and Rs.45-/- on 18-6-1977, 15-8-1977 and 31-8-1977 respectively. He further averred that he informed the defendant to take the balance amount and to execute the sale deed. Thus averments in the plaint clearly indicate that plaintiff was all along ready and willing to perform his part of the his contract. In fact having regard to the admitted position that the plaintiff has paid certain amount to the defendant from time to time, it has to be said that intention of the plaintiff was to get sale deed executed. The first payment of Rs.800/- was in fact prior to the lapse of one month from execution of the agreement and subsequent two payments were after the period of said one month. So considering this position the learned trial Court as well as the first appellate Court observed that the plaintiff was all along ready and willing to perform his part of the contract

and it cannot be said that provision of Section 16(c) of the Specific relief Act were not complied with. Incidentally it may also be noted that the defendant had issued public notice in Daily Satyawadi on 22-8-1978 and he had also shown his willingness to execute the sale deed. At that time it was not even the case of the defendant that plaintiff was not ready and willing to perform his part of the contract. The plaintiff had issued a reply to the defendant's notice in which also he had specifically called upon the defendant to execute the sale deed.

11. Having regard to all these facts it is crystal clear that finding recorded by the first appellate court with regard to issue of readiness and willingness is legal and correct and there is no necessity to interfere with the said finding.

12. In this view of the matter, there is no sustenance in the appeal. The appeal is dismissed with costs.

(S.R.SATHE,J.)